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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. WILBERT LEE NOBLE, Defendant and Appellant.	H025795 (Santa Clara County Super. Ct. No. CC252886)

Following a jury trial, defendant Wilbert Noble was found guilty of one count of aggravated sexual assault of a child under 14/forcible oral copulation (Pen. Code, §§ 269, subd. (a)(1), 288 subd. (a), count one); three counts of lewd act on a child under 14 (Pen. Code, § 288 subd.(a), counts three, four and five); and false imprisonment (Pen. Code, §§ 236-237, count six). Defendant was found not guilty of one count of aggravated sexual assault on a child under 14/sodomy (Pen. Code, §§ 269 subd. (a)(1), 286, count two).

Defendant admitted that he had been convicted of two felonies within the meaning of Penal Code section 667, subdivision (a). Further, the court found that defendant had suffered a prior prison term within the meaning of Penal Code section 667.5, subdivision (b) and that the prior felonies qualified as serious/violent felonies within the meaning of Penal Code sections 667, subdivisions (b)-(i) and 1170.12.

On March 26, 2003, the court sentenced defendant to an indeterminate term of 120 years to life in state prison consecutive to 10 years. The indeterminate term of 120 years to life consisted of a term of 45 years to life on count one and three consecutive 25 years to life terms on counts four, five and six. Pursuant to Penal Code section 654, the court stayed a concurrent term of 25 years to life on count three.

Defendant filed a timely notice of appeal on April 1, 2003.

Defendant raises two issues on appeal. First, he contends that the trial court either erred by admitting evidence regarding Child Sexual Abuse Accommodation Syndrome (CSAAS) or by failing to tailor the evidence to the issues presented in the case. Further the court erred by permitting "a witness who lacked proper qualifications to testify as an expert regarding CSAAS and common reactions of sexually abused children." Second, the admission of evidence of prior sex offenses committed by him to show his propensity to commit such offenses violated his constitutional rights to due process and equal protection under the law. We will affirm.

Facts and Proceedings Below

In 2002, 13-year-old John Doe[1] alternated living with his paternal grandmother and mother during his sixth-grade school year. Defendant was married to John's grandmother. John had known him since he was seven years old. John began playing football in July 2002. The football season continued into the school year. All of the acts of molestation occurred at the grandmother's apartment on Camden Ave in San Jose.

One day after football practice, John walked towards the kitchen of his grandmother's house. Defendant was sitting in a chair near the entrance to the kitchen. As John walked by the chair, defendant pinched John's "butt." Defendant asked John, "where are you going to be when you go back out?" John felt uncomfortable and embarrassed and thought he "would get in trouble" if he told anyone.

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[1] To preserve the victim's anonymity we will refer to him as John Doe or John.

On another occasion, John came into the house after riding his bike. As John walked through the living room to go to his bedroom, defendant pinched John's "butt." John went to his room, grabbed his helmet because he was going to play football, and went outside. John felt uncomfortable and scared. John did not tell anyone about the incident since he thought he "was going to get in trouble because [he] was supposed to tell somebody a long time ago before it happened."

One weekend day, John was sitting on the couch watching the movie "Good Burger." He was wearing shorts and a T-shirt. Defendant came out of his room and walked towards John. Defendant bent down and grabbed John's penis over his clothes for a "[c]ouple [of] seconds." John felt uncomfortable and scared that defendant might do it again. John went to his room, grabbed his clothes, and went outside.

On a different weekend day, John got out of the shower. He had forgotten his towel in his bedroom. He picked up his clothes and pulled the cord to his radio from the wall. When John opened the bathroom door, he saw defendant bent over with his "butt" exposed. Defendant grabbed John's arms at the wrist and pulled John towards him. John tried to pull away, but was unable so to do because defendant was too strong. As defendant pulled John toward him the "top" of John's penis went into "the hole" in defendant's "butt" for about 20 seconds. John thought that defendant was trying to have sex with him. John kicked defendant in the leg and hit him on the back. Defendant released John.

On a weekday during football season, John was in his bedroom getting ready for football practice. Defendant entered John's room and pushed John onto the bed. John fell over backward onto the bed and hit his head against the wall. Defendant pushed both of John's hands above John's head. Defendant put his mouth on John's penis for "some seconds." John tried to push up with his hands, but defendant was too strong. Defendant got up and left the room without saying anything.

On another occasion when John was getting ready for football practice, defendant came into the room and pushed John onto the bed. John fell and his face hit the bed. Defendant got on John's back while he was holding John's bicep area. John tried to get up by doing "a push-up but [he] couldn't" because defendant "weighed too much." John's grandmother came into the room, told defendant to get off John, hit defendant a few times, and told him to pack his things and get out. John's grandmother was upset and told John not to tell anyone about what had happened.

On January 14, 2002, a social worker interviewed John. John told her that nothing had happened.[2] Both John's mother and his grandmother accompanied John to the interview.[3] Defendant waited in the car.

Subsequently, John told his mother that defendant had touched him. She called the police. Detective Heather Randol interviewed John at the Children's Interview Center. Randol arranged for John and his mother to make a pretext phone call to defendant.

The pretext phone call was taped. The transcript of the tape was entered into evidence at trial and the tape was played for the jury.

During the call, defendant stated that he was "sorry about what had happened, the way it happened." John's mother asked defendant why John's grandmother had "to punch [him] that day when [he was] laying on [John's] butt." Defendant replied, "We were playing (inaudible), okay." John's mother asked defendant if he did "anything else besides put [his] mouth on [John's] penis." Defendant responded, "No, uh-huh. Absolutely not." John spoke to defendant. Defendant said to him, "You know, I'm sorry for (inaudible)."

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[2] At trial, John claimed that he had done so because his grandmother had told him before the interview not to say anything.

[3] John was interviewed alone.

Before trial, the defense filed a motion in limine seeking exclusion of CSAAS evidence. Defense counsel contended that CSAAS evidence should be excluded on Evidence Code section 352 grounds and because it does not meet the requirements of the *Kelly-Frye*/*Daubert* test.[4] Counsel argued that the proposed evidence was unnecessary in this case since the expert was only being called "basically to say that there can be inconsistencies and that sometimes children don't report [molestation] right away." The court ruled that CSAAS was beyond the normal experience of the jury and that it would allow the evidence.

Following John's testimony at trial, the prosecution introduced into evidence, over defense objection, the abstract of judgment from two cases.[5] In one case defendant was convicted of lewd and lascivious acts on a niece, who was 10 years old at the time. In the other case, defendant was convicted of oral copulation by force on an 18-year-old male, who was in defendant's care.[6] The jury was instructed with CALJIC No. 2.50.1 as follows: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in this case. If you find that the defendant committed a prior sexual offense you may, but you are not required to infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition you may but you are not required to infer that he was likely to commit and did commit the crime -- the crimes of which he is accused. However, if you find by a preponderance of the evidence that the defendant committed a

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[4] *People v. Kelly* (1976) 17 Cal.3d 24*; Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579.

[5] Before trial, pursuant to Evidence Code section 1108, the prosecution sought to introduce evidence of two sexual offenses committed by defendant. Defendant objected to the admission. The trial court ruled that the prior convictions were admissible, but decided that the evidence should be presented through the admission of the abstract of judgment for the prior convictions.

[6] The first incident occurred in July 1987. The second incident occurred in November 1992.

prior sexual offense that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. The weight and significance of the evidence, if any, are for you to decide."

Subsequently, the People called investigator Carl Lewis to testify. Before he testified, the court admonished the jury with CALJIC No. 10.64 as follows: "Mr. Lewis will testify about Child Sexual Abuse Accommodation Syndrome. This evidence is not received and must not be considered by you as proof of the alleged victim's molestation -- excuse me -- this evidence is not received and must not be considered by you as proof that the alleged victim's molestation claim is true.

"Child Sexual Abuse Accommodation research is based upon an approach that is completely different from that which you must take to this case. The syndrome research begins with the assumption that a molestation has occurred and seeks to describe and explain common reactions of children to that experience as distinguished from that research approach. You are to assume that the defendant is innocent.

"The People have the burden of proving guilt beyond a reasonable doubt. You should consider the evidence concerning the syndrome and its effect only for the limited purpose of showing if it does that the alleged victim's reactions as demonstrated by the evidence are not inconsistent with him having been molested."

Lewis stated that he was a criminal investigator employed by the Santa Clara County District Attorney's office. Primarily, he was assigned to follow up child abuse case investigations. Beginning in 1984, he worked for the Alameda County Sheriff's Department and for the police departments in Redwood City, Los Gatos and Half Moon Bay.

In 1984, Lewis received 24 hours of training in investigating crimes against children, "primarily sexual abuse against children for first responders." In 1992, he attended a 40-hour training course for newly assigned investigators of sexual assault. From that point on, he has built upon his training and experience and now has "probably

500 or more hours of classroom and seminar training primarily in child sexual abuse investigation and aspects of child sexual abuse."

Lewis testified that he had personally investigated 300 to 400 cases of child sexual abuse. In addition to belonging to several professional organizations relating to prosecution of child sexual abuse, he was the acting coordinator of the Children's Interview Center in Santa Clara County. In 1995, he began teaching classes on child interviewing techniques to experienced police officers, psychologists, deputy district attorneys, and mental health workers.

In addition to possessing an Associate in Science degree in the administration of justice, Lewis testified that he was enrolled as a senior at San Jose State University. Lewis testified that he had qualified as an expert in CSAAS about 85 times in the "former Municipal and Superior Courts of Santa Clara County, Superior Court of Solano County, Superior Court of Monterey County, and in the United States Federal District Court in San Jose."

Lewis stated that he had not conducted any investigations in this case. Nor had he interviewed witnesses or read any reports or transcripts. On voir dire, defense counsel established that Lewis was not a medical doctor and did not have a doctoral degree, master's degree or bachelor's degree in any field. He was not a therapist, nor had he treated or counseled anyone for a psychological syndrome.

Over defense objection, the trial court accepted Lewis as an expert witness in CSAAS and the common reactions and traits of sexually abused children.

Lewis described CSAAS as "a concept" that seeks to "put a common language or terminology into some of [the] behaviors or conditions that come up commonly in cases of child sexual abuse and to offer an alternative explanation for them."

Lewis explained that CSAAS came from the work of Dr. Roland Summit, who operated a number of child sexual abuse treatment centers in Southern California. CSAAS consists of five categories of behaviors. The five categories are: (1) secrecy;

(2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and (5) retraction. Not all five categories of behavior are present in every case of child sexual abuse.

Lewis detailed the five categories of CSAAS. "Secrecy describes the fact that the sexual abuse of the child almost invariably occurs when the offender is alone with the child, alone or isolated." "The fact that it's done in those circumstances, that is only when the offender is alone with the child, can convey to the child's sense that this is a secret, bad taboo in some way. And then the offender can do things subtly and not so subtly to reinforce with the child that that's a secret not to share with anyone."

Helplessness refers to the fact that "[n]o child is ever able to resist the sexual advances of an adult particularly a known or trusted adult." Furthermore, "[u]nlike an adult crime victim who we might expect to immediately call 911 and give a full and complete description to the police of the attacker and fully cooperate with the prosecution, a child might let out information over time and not be able to make a full and complete description. Part of the reasons for that can be threats, promises, the child's own internal struggles, maybe the child has a perception of the offender's relationship with a non-offending caretaker, may not want to upset the child, may not tell right away because he or she may feel they might get in trouble and children aren't too likely to tell on themselves."

The entrapment and accommodation category describes how "[w]hen the child is enduring ongoing sexual abuse or even the burden of carrying the secret from a one time incident . . . he or she is trapped. And being trapped in that situation they have to find a way to get by from day to day; that is, they have to accommodate. They have to allow it to go on. [¶] Accommodate can also describe how a child can accommodate, put up with or allow the sexual abuse to continue." "Depending on what the circumstances are, whether it's a family or a classroom or a scout troop or a church, whatever the community that the child is in happens to be -- the child often doesn't want to upset that. And they

may have a sense that if he or she says something or tries to stop the abuse then it may have greater impact than just whatever is that he or she is going to say."

The fourth category – delayed, conflicted, and unconvincing disclosure – "has three parts." With regard to delay, "most sexual abuse is never disclosed during childhood." When it is disclosed in childhood, "[i]t's not uncommon at all for there to be a delay. Sometimes a significant delay between the last incident or the beginning of the abuse until the time that it's reported." A child's statements about abuse may be conflicting: "[A] child might say something at one point and at a later point in the investigation process might say something that is not exactly the same as what he or she said the first time." Disclosure is often the result of a triggering mechanism such as an argument or discipline. "[A] child might come back with, well, the reason I came home drunk or the reason I came home late or something like that is because he's been molesting me. And when the child says that under the circumstances it's usually seen as an attempt to shift blame for the child. The child is trying to get out of the hot seat. He's trying to blame somebody else for something."

Lastly, with respect to retraction, disclosure of sexual abuse can set off a series of events including the child's removal from the household and family pressure. The child may believe that "the way to fix that can be to say, well, I just made it up."

In addition, Lewis testified that "the research shows that a child is more than three times as likely to be molested by someone he or she has a relationship with." Further, the term "grooming" refers to actions taken by molesters to lower a child victim's inhibitions over time. Such acts might include paying particular attention to the child by taking him or her on special trips, doing special things for them or giving them gifts or rewards.

The Defense Case

The defense offered two stipulations. First, that John spoke to social worker Rebecca Menusah on January 14, 2002. Second, defendant and his wife vacated the Camden Avenue apartment on March 10, 2002.

The jury retired to deliberate on the afternoon of January 31, 2003. Deliberations resumed on Monday February 3, 2003. By 4 p.m. on that day the jury had reached a verdict.

Discussion

CSAAS Evidence

Defendant contends that the trial court abused its discretion by finding CSAAS admissible or by failing to tailor such evidence to this case.

CSAAS "evidence is admissible *solely* for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394.) The necessity for this type of evidence arises when the victim's credibility is attacked by a defendant's suggestion that the victim's conduct after the incident, e.g., a delay in reporting, is inconsistent with his or her testimony claiming molestation. (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1383.) The Supreme Court has acknowledged that this type of evidence is admissible for this purpose. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1088 [evidence of battered women's syndrome]; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301 [evidence regarding parental reluctance to report child molestation].)

When CSAAS evidence is admitted into evidence the jury must be instructed that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true. In addition, the jury must be instructed that CSAAS research approaches the issue from a perspective opposite to that of the jury. Moreover, the jury must be instructed that CSAAS assumes molestation has occurred and seeks to describe and explain common reactions of children to the experience. (*People v. Bowker*, *supra*, 203 Cal.App.3d at p. 394.) If a trial court adheres to these procedural safeguards, CSAAS testimony is admissible. (*Id*. at pp. 393-394.)

"[A]t a minimum the evidence must be targeted to a specific 'myth' or 'misconception' suggested by the evidence. [Citation.] For instance, where a child delays

a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such delayed reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust. Where an alleged victim recants his story in whole or in part, a psychologist could testify on the basis of past research that such behavior is not an uncommon response for an abused child who is seeking to remove himself or herself from the pressure created by police investigations and subsequent court proceedings. In the typical criminal case, however, it is the People's burden to identify the myth or misconception the evidence is designed to rebut. Where there is no danger of jury confusion, there is simply no need for the expert testimony. [Citation.]" (*Ibid*., fn. omitted.)

"Identifying a 'myth or misconception' has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation. [Citations.]" (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745.)

In this case, John's trial testimony showed that he did not immediately report the acts of molest because he was ashamed and afraid. In addition, initially, John denied that the defendant had molested him when he was interviewed. Furthermore, on cross-examination, defense counsel challenged John's credibility by focusing on his prior inconsistent statements to Detective Randol and his testimony at the preliminary hearing. Thus, the predicate for Lewis's testimony was the evidence of secrecy, helplessness, and delayed and conflicted reporting.

Defendant concedes that CSAAS evidence "may have been admissible" for the limited purpose of explaining John's "delayed disclosure of the molestations." He argues, however, that the trial court nevertheless erred by failing to tailor the CSAAS evidence to that specific misconception. He argues that it was "simply unnecessary for the jury to hear about the entire gamut of CSAAS theories in order to be told that sexually abused

children sometimes do not disclose the conduct when it first occurs. By abdicating its duty to tailor the CSAAS evidence, the court improperly allowed the jury to hear extraneous yet inflammatory information on such topics as 'grooming,' 'retraction' and the statistically greater likelihood of a child being molested 'by someone he or she has a relationship with.' "

Here, contrary to defendant's argument, CSAAS testimony was admissible under the parameters set forth in *People v. Bowker*, *supra*, 203 Cal.App.3d 385. During cross-examination of John, defense counsel repeatedly attempted to impeach John with his prior statements to Detective Randol and testimony at the preliminary hearing. Thus, Lewis's testimony was directed at rebutting an "attack on the credibility of the alleged victim[]" and it was "targeted to a specific 'myth' or 'misconception' suggested by the evidence" – specifically, the victim's delayed conflicted reporting of the incidents and his initial denial that anything had happened. (*Id*. at pp. 393-394.) In addition, the trial court instructed the jury on the reason for admitting the CSAAS testimony. (*Id*. at p. 394.) Accordingly, we find no abuse of discretion.

Even if we were to agree with defendant that the "inflammatory information on such topics as 'grooming,' 'retraction' and the statistically greater likelihood of a child being molested 'by someone he or she has a relationship with' " was "extraneous," the error was harmless because defendant has failed to show that he was prejudiced by the admission.

We will not set aside a judgment because of the erroneous admission of evidence unless the error resulted in a miscarriage of justice. (Evid. Code, § 353.) The erroneous admission of evidence is tested under the standard set forth in *People* v. *Watson* (1956) 46 Cal.2d 818.

Under the *Watson* standard, the erroneous admission of evidence warrants reversal of a conviction only if we conclude that it is reasonably probable the jury would have

reached a different result had the evidence been excluded. (*People v. Scheid* (1997) 16 Cal.4th 1, 21.)

John's testimony was substantial evidence of the various acts of molestation with which defendant was charged. Specifically, John testified about the acts that defendant committed by describing several incidents where defendant touched him in a sexual manner, including orally copulating him. The possibility that the jurors might have viewed Lewis's testimony as corroboration of John's testimony, rather than explanation, was not that great given that the jury was instructed to consider the CSAAS evidence for the limited purpose of showing that John's reactions were not inconsistent with him having been molested. Furthermore, after reviewing the entire record, and given that the jury found defendant not guilty on count two, we are convinced that the jury was not confused by, or improperly convinced of John's credibility based upon Lewis's testimony.

Accordingly, we conclude that it is not reasonably probable that the jury would have reached a different result if the CSAAS evidence had been excluded.[7]

Defendant contends that the court abused its discretion by permitting Lewis to testify when he lacked sufficient qualifications to testify as an expert of CSAAS and the common reactions/traits of sexually abused children.

"Evidence Code section 720, subdivision (a), allows a witness to testify as an expert 'if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' " (*People v.*

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[7] That is not to say that we believe that in every case generic CSAAS evidence is admissible or that its erroneous admission is harmless error. We note that in this case, before trial, the prosecutor stated that it was his policy to call Mr. Lewis "in every single case" where there was a late disclosure. We remind counsel that *People v. Bledsoe* (1984) 36 Cal.3d 236 does not make " 'general' testimony of CSAAS admissible in every, or for that matter any, child abuse case." (*People v. Bowker*, *supra*, 203 Cal.App.3d. at p. 393.) It is admissible only to rehabilitate a witness's credibility when the defendant suggests that the child's conduct after the incident is inconsistent with his or her testimony claiming molestation. (*People v. McAlpin*, *supra*, 53 Cal.3d at p. 1300.)

Chavez (1985) 39 Cal.3d 823, 828.) "[A]n expert's qualifications 'must be related to the particular subject upon which he is giving expert testimony. Qualifications on related subject matter are insufficient. [Citations.]' [Citation.] . . . [¶] We are required to uphold the trial judge's ruling on the question of an expert's qualifications absent an abuse of discretion. [Citation.] Such abuse of discretion will be found only where ' "the evidence shows that a witness *clearly lacks* qualification as an expert . . . ." ' " (*Ibid*.)

" ' "[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." ' [Citations.]" (*People v. Jenkins* (1975) 13 Cal.3d 749, 755.)

Lewis limited his testimony to CSAAS, which was aimed at debunking myths regarding the behavior of abused children. He did nothing to misrepresent his credentials explaining he had "an associate of science degree in administration of justice," and admitting he was not a psychologist, a psychiatrist, or a licensed therapist. Under these circumstances, defendant's complaints about Lewis's qualifications go to the weight of his testimony, not its admissibility. (See *People v. Chavez*, *supra*, 39 Cal.3d at p. 829.)

Evidence Code Section 1108

Pursuant to Evidence Code section 1108, the trial court admitted evidence showing that the defendant had previously committed two sexual offenses. Defendant contends that the admission of this evidence to show his propensity to commit such crimes deprived him of due process and equal protection under the law. *People v. Falsetta* (1999) 21 Cal.4th 903, has rejected the due process argument. We are bound by the Supreme Court's ruling on that point. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

People v. Fitch (1997) 55 Cal.App.4th 172 (*Fitch*) held that Evidence Code section 1108 does not violate the equal protection clause. (*Id*. at pp. 184-185.) The *Fitch* court noted that an "equal protection challenge to a statute that creates two classifications of accused or convicted defendants, without implicating a constitutional right, is subject to a rational-basis analysis. [Citation.]" (*Id*. at p. 184.)

Accordingly, "[t]he Legislature determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justified the admission of relevant evidence of defendant's commission of other sex offenses. This reasoning provides a rational basis for the law . . . . In order to adopt a constitutionally sound statute, the Legislature need not extend it to all cases to which it might apply. The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others. [Citation.]" (*Fitch*, *supra*, at pp. 184-185.)

We agree with *Fitch's* analysis of this issue. Accordingly, we reject defendant's constitutional challenges to the statute.

Disposition

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.